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ARE WOMEN BY REASON OF BEING VOTERS ENTITLED TO SIT ON THE JURY.

The suffrage laws and amendments which have emancipated women from the political domination of men in much the same way as the Married Women's Acts of a former generation released her and her property from the domination of her husband, are raising new questions as to the implications that arise out of the new rights thus granted.

Thus, the question has arisen in New York whether the right of jury service is not incidental to and implied in the grant of suffrage. A decision of the special term of the Supreme Court (Kings County) has decided that the right to serve as jurors was not conferred by the suffrage amendment to the New York Constitution. *In re* Grilli, 179 N. Y. Supp. 795. In this case the Court denied a peremptory writ of mandamus directing the Commissioner of Jurors to include in the jury list every qualified woman of Kings County. The Court said:

"The petitioner insists that the word 'jury' has always meant twelve voters, but there is not a single expression in any of the acts with reference thereto which warrants any such conclusion. For instance, she asserts that because the act of the Colonial Legislature of November 27, 1741 (3 Colonial Laws, c. 720), provided that jurors were to be selected from the freeholders, and freeholders were voters, therefore the duty to sit as a juror showed the right to vote. It is true that law limited the right to freeholders to sit upon a jury, but that is far from meaning that, because a freeholder was a voter, he was a juror because he was such voter. It will be observed that in this very law freeholders over the age of seventy were excluded from jury service.

"It is also argued that the word 'peers' meant those of equal political rights, that is, a right to vote, and that since a jury is to be selected from the peers of the litigants or a person on trial, that meant a jury of voters. 'Peers' might mean voters, yet the claim would be met by having none but voters as jurors. But this would not require the inclusion of women, even if they be voters. But the word 'peers' in this country really means a citizen and nothing more. I can see absolutely no connection whatever between the right to vote and jury service to justify relator's claim. Were this the only consideration on this application, there would be no difficulty whatsoever in concluding that women citizens are not entitled to serve as jurors in light of the statute."

In Wyoming the same principle was announced in the case of McKinney v. State, 3 Wyo. 719, 723, 30 Pac. 293, 295, 16 L. R. A. 710, 712, where the Court declared that they "had not much doubt that women were not eligible as jurors under the territorial statutes, as the right to vote and to hold office does not include the right, if right it may be termed, to serve as a juror."

It has been suggested that the case of Strauder v. West Virginia, 100 U. S. 303, establishes a different rule. In this case it was held that a county judge of Virginia, charged by the law of that state with the selection of jurors, was properly indicted under an act of Congress, passed for the enforcement of the Fourteenth Amendment, for excluding and failing to select as grand jurors and petit jurors certain citizens of his county of African race and black color, who possessed all other qualifications prescribed by law.

It has been argued that the declaration by the majority of the Court in the Strauder case that "the state may confine the selection of jurors to males" is *obiter* and that logically the Fourteenth Amendment prohibits discrimination in the selection of jurors or account of sex. It is also contended that the suffrage amendments declaring that the rights of citizens of the state to vote and hold office shall not be denied or abridged on account of sex also secures to women the privilege to serve as jurors.

Both these contentions, it seems to us, fail to take into account that the duty to serve as a juror is not a "right" of the

citizen protected by either state or federal constitutions; nor is it implied in the right to vote or hold office. Jury service is an obligation imposed on citizens of recognized qualifications. Some laws provide that citizens above a certain age shall be excluded from jury service. Some states provide property, others educational qualifications. Citizens thus excluded from jury duty have not been denied any of their rights as citizens any more than young men who were excluded from military service in the recent war because of physical, moral or educational reasons were deprived of any of their rights as citizens. The Strauder case merely holds that the only discrimination a state is prohibited from making in any of its laws is one based on race or color. Aside from this distinction it may, in imposing duties and obligations on its citizens, discriminate between males and females, between rich and poor, between educated and uneducated—this for the reason that when the state desires *service* it has a right to say who shall render that service and what qualifications they must have before they can enter upon such service.

Whether the legislature should make any distinction as to sex in respect to the duty of citizens to serve as jurors is not a question of right but of expediency. The appeal made by the Women's Bar Association to the New York legislature to remove the restrictions against women as jurors (January 12, 1920) is a strong appeal for extending the *obligations* not the *rights* of women. It is an appeal by the women to be allowed to share more largely in the burdens of citizenship, having secured, as we believe they were entitled to have, all the rights of citizenship. But we suggest that the women do not put their case on the ground that jury service is one of their rights but to consider carefully whether women are fitted by reason of physical and domestic disabilities from properly performing the onerous duties imposed on jurors. The temporary disabilities of maternity and those arising out of the important duties of motherhood and the care of large families should be carefully studied. We deplore the contemptuous attitude of some women (most of them unmarried or childless) toward the duty of women toward childhood. When it comes to the relative importance of the duties to be imposed on citizens the task of training and caring for the children is by far more important than the duty to serve as jurors. Jury service being in the category of duties and not of rights, the legislature may very properly declare that it would be against public policy to require any woman to perform duty of this kind, if it would interrfere in the slightest degree with the performance of those higher and most sacred of all obligations—the care of the home and the family.

But if, after taking all these things into consideration, it should be found that there are many women who, because of their intellectual qualifications and freedom from the restraints of motherhood are able to serve and whose service in this respect on the jury would facilitate and improve the administration of justice in the Court, then, under such circumstances and with proper safeguards and exemptions, we believe a legislature would be justified in removing the broad arbitrary restriction against women serving as jurors.

We believe, however, that, in such event, instead of providing for exemptions from jury service on the ground of maternity, motherhood, large family, etc., and thus attempting to anticipate the cases when it would not be public policy to impose this additional burden upon women, it would be better to let the women themselves determine when they think it would be unwise for them to assume the duty of jury service. This is the law in five of the six states which now impose the duty of jury service upon women, to-wit: Kansas, California, Utah, Nevada and Colorado. Only in Idaho is jury service by women mandatory. In the other states there is some provision permitting women to be exempted if they so plead.

Our principal purpose, however, in this editorial is to take the question of extending the duty of jury service to women, out of the realm of political discussion about the rights of women. We understand that in some Western states this ridiculous and wholly unfounded consideration swayed some legislators into voting for a measure which they thought was intended further to enfranchise women and confer on them additional rights. In all states where, by the Married Women's Acts, all the disabilities of coverture have been removed and where the right to vote and hold office is secured to her, all the so-called rights of citizenship are already hers. Now the question will recur not infrequently—How much of the burdens of citizenship is she able and qualified to bear without interfering with interests in which the state is vitally concerned and which she alone can properly care for? Any duties imposed on women which seriously interfere with the obligations of motherhood or which tend to encourage women to shirk the highest of all duties she owes to the state—the duty to have and to care for children—will steer the ship of state upon the rocks of unavoidable disaster.

NOTES OF IMPORTANT DECISIONS.

DOES THE TERM "FAMILY" IN A WILL INCLUDE A WIFE.—The law is often compelled to make many illogical distinctions in reaching just results, which is evidence, if any is needed, that law is not logic. Law is an experimental science and follows the experiences and needs of men rather than the inexorable demands of logic. This thought is illustrated by the result in the recent case of Lemmon v. McElroy, 101 S. E. 852, where the Supreme Court of South Carolina held that, although the word "family" may, under different circumstances, mean a man's household, consisting of his wife, his children, and servants, or may mean wife and children, or only children, the last meaning is the primary meaning, which will be given to the word when used in a will, unless the context indicates a contrary intention.

In this case A's will gave property to B for life, remainder to B's children if she leaves any, otherwise to B's brothers and sisters or their "families." At the date when the will took effect B had three brothers and sisters. One brother, Alexander McElroy, had died, leaving Fannie McElroy, his widow, but no children. Fannie McElroy claimed one-fourth of the estate as the "family" of her husband. The Court held she was not included in the term "family" and could not take under the will. The Court declared that while the term "family" has a varying signification and is sometimes used to include not only the wife but sometimes the servants of the household, its primary signification is "children." As the term enlarges it includes all those who are "closely related by blood." It is only for special purposes as in the homestead acts that it is further enlarged to include the wife and its furthest reach, popularly, but not often legally, takes in all the members of a man's household. Which of these meanings are to be assigned to the use of the word in a will is a matter of construction. In seeking to find the testator's intention in the principal case the Court said:

"Studying the general language of the will before us, we see that the testator has been very particular to provide that the bequest in the first clause of the will should be for the use of Sarah and her children, should she have any children, but in no event could her husband receive any portion of it, presumably because he was no blood relationship to the testator; in case Sarah had no children, then the bequest was to her brothers and sisters, or their families. It is hardly to be believed that the testator would be so particular to provide that the bequest should be free from interference or ownership by one who was not of the same blood while the bequest was in the hands of Sarah and her children, and yet be so indifferent upon that point if the bequest should fall into the hands of her brothers or her sisters. This being inconceivable, we must conclude that the testator used 'families' in the primary sense, and as interchangeable with and equivalent to children."

In spite of the authority which the majority of the court adduces in support of its position we cannot conceive that the court is really effecting the intention of the testator by its strained and unsual construction of the word "family." This word not being a word of technical legal meaning, like "heirs" or "next of kin," should be construed in its popular sense and in this sense the "wife" is a part of the husband's "family." Indeed, the word family necessarily includes the wife since a family could not exist in the legal or popular sense without a wife. Suppose the widow of Alexander McElroy had had one child living at the time the contingent remainder took effect there can be no doubt that she and her

child would have taken equally as constituting the class named in this devise under the term "family." Does a wife lose her membership in the "family" of her husband when her children die? Or, is birth of issue necessary before a "family" can be said to exist between those joined in the holy bonds of matrimony.

It seems to us that the word "family" was carefully chosen by the testator with the intention of providing for those toward whom the contingent remaindermen sustained a family relation. If the testator desired to limit the devise to blood relations of the remainderman, he could easily have used the term "descendants."

THE RECOVERY OF THE VALUE OF STOLEN PROPERTY BY ACTION OF ASSUMPSIT.—In a recent case the Superior Court of Delaware discusses the following interesting question of procedure: Can the plaintiff, where there is a tortious or wrongful taking or detention of personal property, which has not been sold by the tortfeasor, waive the tort and recover the fair value thereof, in an action of assumpsit upon a count for goods sold and delivered?

In the case of Conaway v. Pepper, 108 Atl. Rep. 676, the evidence showed that defendant tortiously secured possession of plaintiff's wagon by misrepresenting to plaintiff's hired man that plaintiff had granted him permission to use the wagon. Defendant still retained the wagon and refused to return it, claiming that plaintiff had agreed to trade his wagon for one of defendant's. Plaintiff brought suit in *indebitatus assumpsit* for goods sold and delivered. Defendant secured instruction directing a verdict in his favor on the ground that an action in assumpsit was an improper count on the fact adduced, since it did not appear that defendant had sold the wagon and was retaining any proceeds thereof belonging to plaintiff.

There can be no doubt that this was the common law rule, which was due to the fact that for a long while, in the history of the English law, the count for money had and received was the only form of indebitatus assumpsit which was used in cases involving the waiver of tort. 2 Street, Foundations of Legal Liability, 216.

The old rule in Delaware was the common law rule and the trial court was justified in its ruling. Hutton v. Wetherald, 5 Harr. 38. In reversing the decision of the lower court, therefore, the appellate court was compelled to overrule its former decision which it proceeded to do, however, without apparent reluctance. The Court said:

"It would seem that every reason for allowing a recovery in assumpsit, upon a count for money had and received, of the amount for which the property was sold, will apply with equal force, to a case for the recovery of the fair value of the property, upon a count for goods sold and delivered, where the property is not sold, but retained or consumed by the tortfeasor."

The rule announced by the Court in this case is abundantly sustained by the authorities of many states. Keener, Quasi Cont. 192; 2 Page on Cont. § 843; 2 R. C. L. 756, 757; Woodruff v. Zaban, 17 Ann., Cas. 975 (note) 977; 1 Cooley on Torts, §§ 109, 111; 1 Hilliard on Torts, 47; Putnam v. Wise, 1 Hill (N. Y.) 240 (note); Hill v. Parrott, 3 Taunton, 274; Bradfield v. Patterson, 106 Ala. 397, 17 South. 536; Roberts v. Evans, 43 Cal. 380; Fountain v. Sacramento, 1 Cal. App. 461, 82 Pac. 637; City of Elgin v. Joslyn, 136 Ill. 525, 26 N. E. 1090; Reynolds v. N. Y. Trust Co., 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N. S.) 309; Douns v. Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; Crane v. Murray, 106 Mo. App. 697, 80 S. W. 280; Galvin v. Mac Mining & Milling Co., 14 Mont. 508, 37 Pac. 366; Abbott v. Blossom, 66 Barb. (N. Y.) 353; Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803; Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 135; Barker v. Cory, 15 Ohio, 9; Albrook v. Hathaway, 3 Sneed (Tenn.) 454; Tidewater Quarry Co. v. Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864, 8 Ann. Cas. 736.

The basis of the rule today of the right to waive the tort and sue on indebitatus assumption for goods sold and delivered is the unjust enrichment of the tortfeasor. There is a *quasi* contract, for breach of whch the plaintiff is allowed to recover the amount which it is against conscience for the defendant to keep. Keener, Quasi Contracts, 159, 160.

A CONFESSION NOT AFFECTED BY THE FACT THAT ACCUSED WAS SUFFERING WITH THE INFLUENZA—The "flu" is not a disease to be "sneezed at" or made light of, as the writer can well certify to from experience. But whether it is a disease serious enough to interfere with the ordinary operations of a rule of evidence might well be left to the circumstances of each individual case. In the recent case of State v. Babineaux, 83 So. Rep. 558, the "flu" was interposed as an objection to the introduction of a confession on the part of the defendant who alleged that he was out of his head at the time it was made. In overruling the objection the Supreme Court of Louisiana said:

"The confessions of two of the accused were objected to as having been induced by promises, and that of the other accused as having been

made while sick with the "Flu," and out of his head. The accused testify to the promises having been made, but the persons to whom the confessions were made testify positively and unqualifiedly to the contrary. While the accused, who was sick, testifies to his having been out of his head when he made the confession, and the person to whom he made it says that the accused was very sick—said he had pneumonia—the fact remains that he was not so far out of his head as not to have been able to make the confession; and there is no pretense that he was induced to make it by any promise or prompting from anybody."

LIABILITY FOR COLLISION BETWEEN RAILROAD AND AUTOMOBILE WHERE VIEW IS UNOBSTRUCTED. — The great number of automobile accidents at railroad crossings and the many legal questions that arise out of such accidents is sufficient to make the recent case of Barrett v. Chicago, M. & St. Paul Ry. Co., 175 N. W. Rep. 954 of some interest.

In this case plaintiff's intestate was riding as a guest in an automobile being driven through the city of Tama, Iowa, across the tracks of the defendant railroad. The plaintiff could have seen the train, probably did see it a long way off, but claimed that the train was exceeding the speed allowed by city ordinance. He also claimed that the enginer could have seen the automobile in time to have stopped the train and that under the last clear chance doctrine the defendant was liable. The plaintiff secured a judgment, which, however, was reversed on appeal and the Supreme Court carefully reviews the whole case and clearly states the respective rights of automobile and railroad under such circumstances.

On the question of speed the Court holds that, although plaintiff's intestate saw the train approaching, he had a right to assume that the engineer would give the customary warning and would not run at a speed in excess of that allowed by law.

The point in the case on which the Court reversed the judgment was the declaration in the instruction that the defendant was liable on the doctrine of last clear chance if the engineer by the exercise of ordinary care should have discovered the peril of the deceased. On this point the Court said:

"Nor does the instruction under which this issue was submitted correctly state the law. In the twenty-fourth paragraph of the charge, the Court said that:

"The rule that, where one, through his own fault, puts himself in a place of danger on a railroad track, he is precluded from recovering damages for his resultant injury or death, is subject to the qualification that where the engineer has, *or by the exercise of ordinary care should have*, discovered the peril of the deceased or his position, and it is apparent that he cannot escape, or he, for any reason, does not make effort to do so, it becomes the duty of the engineer to use all means in his power to avoid injuring the person."

"The italics are ours, and are used to point out the precise error the court fell into. It is the settled doctrine of this court that, in order to render the employes of a steam railway company negligent under the doctrine of last fair chance, they must have actually seen the persons injured in such time that, by the exercise of ordinary care, they could have avoided injuring them. It is not enough that, by the exercise of ordinary care, they must have seen. It must appear from the evidence that they in fact did see or knew of their perilous position."

We discussed this rule in an annotation to the case of Aiken v. Metcalf, 102 Atl. Rep. 330; 86 Cent. L. J., 68. The rule of last clear chance is generally limited to cases of wanton, willful injuries inflicted on those whose contributory negligence has placed them in a position of peril. A very recent case by the Supreme Court of Connecticut was announced requiring the injuring party to use every reasonable precaution to discover one who is in a position of danger due to his own negligence. Tullock v. Connecticut Co., 108 Atl. Rep. 556. We believe this rule is open to the objection that one is not expected to anticipate that another will act carelessly in a given emergency.

Another interesting question in the case was that plaintiff claimed that his decedent, Berger, was a guest in the machine operated by one Reinig and that therefore the latter's negligence was not to be imputed to him. The defendant insisted that Berger and Reinig were engaged in a joint enterprise. But the Court, after declaring that the evidence clearly showed that Berger was a guest, held that this was unimportant since even a guest in a machine is liable for failing to look out for his own protection. On this point the Court said:

"Whether or not they were engaged in a joint enterprise, however, was not very important, for Berger, even though a guest, was required, in the exercise of ordinary care for his own protection, to keep a vigilant lookout for approaching trains, when about to pass over the railroad crossing. He was sitting on the front seat with the driver, and enjoyed opportunities for seeing and listening equal to those of the driver. There is no reason for exacting a less degree of care in these respects than Reinig was required to exercise. Beemer v. Railroad, 181 Iowa, 642, 162 N. W. 43."

This last holding by the Court should not be understood to change the well-settled rule that the contributory negligence of the driver of an automobile is not to be imputed to the guest. The rule stated by the Court and which

seems to have surprised both the plaintiff and the defendant is one which requires a passenger in an automobile to exercise reasonable care for his safety. Just what is the extent of a passenger's responsibility in this regard is not clearly settled by the authorities. The guest, of course, is not expected to interfere with the operation of the machine. Latimer v. Anderson Co., 95 Car. 187. But one thing he is required to do: He must keep his eyes open and not close them to obvious dangers. Sherris v. Northern Pac. Ry. Co. (Mont.) 175 Pac. 269; Virginia, etc., Ry. Co. v. Skinner, 119 Va. 843, 89 S. E. 887. It is his duty to use reasonable care in looking and listening for trains as an automobile approaches a crossing and to call the attention of the driver to the presence of danger. Lawrence v. Denver, etc. Ry. Co. (Utah), 174 Pac. Rep. 817; Anzinger v. Ry. Co. (Pa.), 105 Atl. 87; Brommer v. Ry. Co., 179 Fed. 577, 29 L. R. A. (N. S.) 924; Thompson v. Ry. Co., 165 Cal. 748, 134 Pac. 709.

IS A COVENANT AGAINST ASSIGNMENT OF LEASE WITHOUT LANDLORD'S CONSENT EXTINGUISHED BY CONSENT ONCE GIVEN?

When a lease has a covenant that the tenant shall not assign the agreement, or underlet any part of the premises, and that even though the landlord shall consent to an assignment, no further assignment shall be made without express consent in writing by the landlord, and there is not a similar covenant that no further underlettings shall be made without express consent, and one consent to underlet is given, is the condition not to underlet thereby discharged?

The question of the right to sublet under a lease which requires the consent in writing of the lessor has arisen in New York and elsewhere from the fact that rentals have recently increased enormously since many leases were made, and landlords have refused to accept unobjectionable sublessees, hoping thereby to force the tenant to surrender the premises. Heretofore in this country the provision requiring the consent of the landlord has been invoked by the landlord in order that undesirable tenants should not be substituted for the original lessee without his consent, and cases are not found providing that consent shall not be withheld except upon reasonable objection, but in England the greed of landlords has forced such a provision into leases for dwellings, and hereafter it will be necessary for tenants here to see to it that they are protected in this particular.

"In the absence of statutory or contractual restrictions to the contrary, a lessee for years may, without the lessor's consent, or an express provision in the lease, either assign, sublet, or mortgage or otherwise encumber the term granted by the lease."[1]

And it would seem that the lessee's right to sublet may be so restricted by statute or in the terms of the lease by a covenant requiring the lessor's consent in writing, without providing that consent shall not be withheld except upon reasonable objection, that the lessor can arbitrarily refuse to give consent, in which case the lessee will not have any remedy against the lessor for refusal to consent thereto, provided that appropriate language is used. A covenant not to assign or sublet is to be construed strictly against the lessor.[2]

There are two lines of decisions upon this question, the one laid down in McAdam on Landlord and Tenant,[3] where it is said:

"A single license to sublet or waiver of one act of subletting does not authorize a subsequent subletting,[4] the rule in regard to assignments being inapplicable. The Court, in McKildoe's Ex'r v. Darracott,[5] said: 'The only difference between an assignment and underlease in this respect is that the doctrine of Dumpor's case[6] in regard to assignments has not been extended to underleases. It was held in that case that a

(1) 24 Cyc. 962.
(2) Livingston v. Stickler, 7 Hill (N. Y.) 253; 24 Cyc. 967.
(3) Vol. 1, p. 559.
(4) McKildoe's Ex'r v. Darracott, 13 Gratt. (Va.) 278, 286; Seaver v. Coburn, 10 Cush. 324; Lynde v. Hough, 27 Barb. (N. Y.) 415.
(5) Supra.
(6) 2 Coke R. 119B.

license to assign any part is a dispensation of the whole condition, and the lessee or his assignees may assign all the residue without license. Whereas, it has been since held that a lessor who has a right of re-entry on a breach of covenant not to underlet, does not, by waiving his entry on one underletting, waive his right to re-enter on a subsequent underletting.[7] *In the former case the waiver is of the condition itself. In the latter only of the forfeiture for a particular breach.* But in the latter each breach is a complete and not a continuing act of forfeiture.' "

The cases quoted to sustain this position are McKildoe's Ex'r v. Darracott,[8] in which it is held that (1) a lease being forfeited by the act of the lessor in subletting the premises, the forfeiture will be waived if the lessor with knowledge of the forfeiture accepts rent or sues out a distress for rents accruing after the forfeiture; (2) a subletting is not a continuing act of forfeiture, and if the forfeiture is once waived, the waiver cannot afterwards be retracted.

The Court relied on Doe v. Bliss,[9] but in that case it was held that, "Dumpor's case is the law and we cannot now revoke it." In Doe v. Bliss, the covenant was that the lessee should not underlet the premises, which he did, and the landlord received the rent. And it was claimed that by condition broken and forfeiture waived by the first underletting the condition was gone forever, and Dumpor's case was cited as authority to sustain that position. The Court said in Doe v. Bliss:

"I suppose the defendant relies on Dumpor's case and infers that this tolerance is tantamount to a license, but this is too strong a proposition," which clearly draws the distinction between waiver of a breach of a condition and giving a license to sublet. It is stated in 1 Taylor, § 410, that there is no distinction between giving a license to assign or to sublet, and the statement in this case that the doctrine in Dumpor's case has not been extended to subletting is without correctness or weight. See, also, 24 Cyc. 962, and cases cited, quoted above.

In Lynde v. Hough,[10] the lease contained a clause not to let or underlet any part or the whole of the demised premises without written consent of the lessor, under penalty of forfeiture. The lessee, E. C. Hough, without license or consent, assigned his interest to H. R. Hough. Plaintiff sued to recover possession and got a verdict for $4,000.

The Court held that the assignment of his right and interest in the lease without the consent of the plaintiff was not a breach of the covenant not to underlet. Dumpor's case is not denied and the case turns on the breach being an assignment of the term, and not an underletting.

Seaver v. Coburn[11] was an action for breach of covenant not to underlet or permit any other person to occupy certain premises. Defendant underlet to Eagle Lodge. Plaintiff accepted rent quarterly for six years. It was held that as

"the use by Eagle Lodge has been subsequently sanctioned by the plaintiff by receiving from them the quarterly payment for rent, and if, as to such use, there was a full waiver of the breach of covenant 'not to permit any other person to occupy,' that would be no bar or defense to an action for another and distinct breach, that had not been waived."

All the above cases except Lynde v. Hough are waivers of breaches of covenants or conditions after breach, which is a different thing from giving a license to a tenant who has not broken a covenant, as is the case in the question under consideration, which distinction is made in Doe v. Bliss.[12] The waiver of the breach of a condition reaffirms the lease as it was before the breach. The other doctrine is stated in 1 Taylor on Landlord and Tenant, § 410, as follows: "When a license to assign or underlet has once been given, the condition is thereby discharged, and no forfeiture is

(7) Doe v. Bliss, 4 Taunt. R. 735; Archbold 97.
(8) 13 Gratt. (Va.) 276.
(9) 4 Taunt. 735.
(10) 27 Barb. (N. Y.) 415 (1857).
(11) 10 Cush. 324.
(12) Supra.

incurred by any subsequent alienation; for a proviso, or condition, cannot be divided or apportioned by act of the parties." Where there is a mere condition and no covenant, a license discharges all restriction; but if there is a covenant with a proviso of forfeiture super-added, the latter only is discharged.

In Dumpor's case,[13] there was a bare condition, not a covenant. The two cases, Doe v. Clark, 8 East. 185, and Doe v. Hawke, 2 East. 481, merely attempted to state that case; both were *dicta,* and in the former case the covenant was against underletting. And in Dickey v. McCulloch,[14] it was held that the condition was discharged, but that an action still lay on the covenant. The reason for this will appear on referring to the leading case, which went on the insusceptibility of a condition to be apportioned, while a covenant may be. Note 4, § 410, *supra.*

This doctrine that there is no difference between a license given to assign or to sublet is correct, and in harmony with it is the statement in 24 Cyc. 962, 967, concerning the right to assign or sublet in the absence of contractual restrictions, which cites Schenkel v. Lischinsky,[15] which held that an agreement by a lessee to convey a lesser interest than he himself possessed is not an agreement to assign a lease, but is an agreement to sublet and in the absence of a prohibition against subletting in the original lease, is enforceable.

A license to assign or a license to sublet is a license in either case, which in itself has the same characteristics in law in each case, although the act to be done in each is different. A license is merely a permission to do an act, or authority to do some act, as stated in Clifford v. O'Neill.[16]

The leading case in New York on the question under discussion is Siefke v. Koch,[17] which case has been cited but once. In the syllabus it is said:

"The consent of the landlord or lessor that the lessee may assign the lease to another operates as a discharge thereafter of the covenant that the lease should not be assigned without the lessor's consent."

In the opinion, the Court says:

"The consent of the plaintiff (lessor) that Krakenbuhl, the lessee, might assign to the defendant (assignee), operated as a discharge thereafter of the covenant that, the lease should not be assigned without the plaintiff's consent, and the defendant took by the assignment the remaining interest in the premises, free from the restraint of the condition."[18]

In other states this doctrine is followed as follows: Where there is a condition in a lease against the assignment of the term without the consent of the lessor, and such consent is given to one assignment without any restriction as to future assignments, the condition is waived altogether, and the assignee may assign the term without the consent of the lessor.[19]

If the lessor consents to an assignment of the lease (where the lessee covenants that he will not assign without the lessor's written consent), or if he waives the lessee's breach of condition against assigning, the covenant is extinguished in the absence of statute to the contrary.[20]

Where a lease contains a covenant against assignment, and the restriction is once removed, it operates as a removal of the restriction forever.

"It is questionable whether in any case such a covenant would be enforced so as to produce forfeiture. It is a restraint on alienation and therefore against the policy of the law."[21]

GEORGE URQUHART.

New York City.

(13) 2 Coke 119B.
(14 2 W. & S. (Pa.) 100.
(15) 45 Misc. (N. Y.) 423; 90 N. Y. Supp. 300.
(16) 42 N. Y. Supp. 607, 609; Davis v. Townsend, 10 Barb. (N. Y.) 333, 343.
(17) How. Pr. 383.
(18) Dumpor's Case, 2 Coke 119B; Daken v. Williams, 17 Wend. (N. Y.) 459.
(19) Reid v. Wiessner Brew. Co., 88 Md. 234; Pennock v. Lyons, 118 Mass. 92.
(20) 24 Cyc. 963; Citing Siefke v. Koch, 31 How. Pr. 383; Munday v. Harway, 56 N. Y. 337.
(21) Chipman v. Emerie, 5 Calif. 49.

UNPUBLISHED LAW.

Largely by reason of much iteration and reiteration, it has come to be assumed that justice is hag-ridden by too much case law. So seriously has the legal profession and the judiciary accepted this as a postulate that various revolutionary expedients and devices have been evolved and encouraged to meet the "evil." Some of these efforts have had a beneficent effect, *vide:* the agitation for a shortened opinion, as an example. On the other hand, some have not resulted satisfactorily, and justice is the loser by their sanction and adoption. It is of one of these latter in particular—the memorandum decision—that I desire to provoke discussion.

In an address to the Judicial Section of the American Bar Association at its annual meeting in Boston this year, H. E. Randall, of the West Publishing Company, expressed some valuable thoughts and gave some valuable data on the matter of law reporting. Among other things, he explained the functioning of the selective system for decisions. This seems to be a plan by which the judges of appellate courts, or committees of lawyers for them, designate only certain decisions for publication in the official law reports. The balance are not officially printed. According to him, this method of "reducing" the law had vogue in Kentucky and in Nebraska and even now is in operation in England. The consequence, as he graphically explained, was that irregular (not nefarious) methods were (and in England are) used to get the contents of the records in the suppressed cases before the lawyers and *nisi prius* judges, and then these decisions became indirectly law by citation and recognition, although, so to speak, born under the bar sinister. No elimination of matter, and much confusion of application and use, therefore, took place.

Now the point I wish to make—and I make it as a practicing lawyer—is that clients employ lawyers to advise them as to the law. It is highly moral, and unquestionably sound, to urge that the end of the law is justice. Nevertheless, it is demonstrably clear that the law, being an enunciation of general rules, must very frequently work injustice. As long, however, as the law is certain, men may define the boundaries of their conduct. When it becomes uncertain, even lawyers cannot advise them. Certainty is therefore the prime purpose or value of the law, and justice only second. In insisting upon the need of some certainty I am but following in the tracks of Mr. Frederick Coudert, as made by his essay on "Certainty and Justice."

Certainty can only be gained for the law by making the law known or knowable. If by no amount of address and application can a lawyer determine the state of the law, then indeed is Justice blind, then indeed are her scales loaded. In order to render the law known, and, as a corrollary, certain, it must be published. In the instance of selective decisions, it does, at least, get published, "after dark" so to speak. Because the memorandum decision does not even purport to publish the law—although it makes it—it is very considerably more vicious than the other plan.

With all reasonable and enlightened attempts to solve the problem presented by the burden of case law I am in sympathy. Brief and concise opinions are especially appealing to the practitioner. Contrary to the general condition of affairs with relation to the increased length of opinions engendered by the habit of loose dictation and the typewriter, I find that our Florida Supreme Court has in recent years pretty faithfully wedded itself to brevity. The earlier reports of the State are loaded with tremendous and heavy opinions that dishearten and obfuscate the lawyer. Present-day opinions of the court are much more pithy and much less discursive. Encyclopedias and texts to the contrary—they do not seem to have consulted or referred to Florida decisions upon many of the points to which they have spoken—these latter-day decisions of the Florida court display learning, good reasoning, and, as often as

is usual with similar courts in other jurisdictions, sound law. Our court is, however, unfortunately addicted to the course of memorandum decisions. True the Supreme Court of the United States and many other highly respected courts have fallen into a like habit, but that cannot sanctify or justify it or relieve it of its odium.

The excuse for the practice seems to be that it is a remedy or specific for the fatty degeneration of present-day case law. Were it so, it is in reality a parasite more noxious than the pest it attacks. I am not sure, however, that the case law problem is so serious as it is described to be. Supposing that there exists an oppressive bulk of case law, what harm does it do? It is my experience that the lawyers in large cities rarely have extensive libraries. They appear to rely mainly on general bar association libraries and to do business on a very light office library equipment. Those first-class firms that do indulge in many books have incomes upon which a few sets of reports more or less can make little impression. We country lawyers are differently situated. Yet many of us make a living with a very scanty showing of shelves, and, again, those of us who want a good working supply of authorities seem to be able to get them furnished to us without being reduced to penury. In fact, it is only with respect to the reports of cases in other jurisdictions than our own that the extent and cost of case law can be regarded as onerous. Admitting that, what lawyer finds that these "foreign" citations have even their legitimate weight as persuasive authority before the *nisi prius* judges? Only when it comes to Supreme Court briefs do they come into their own, and, even here, they yield readily to distinction and difference. Standing upon a separate base of statute and custom law, they must do so. In this state of things, can a little-considered plethora of case law from other jurisdictions compensate for a reduction of the invaluable and eagerly wanted case law of the sovereign jurisdiction where the lawyer practices? Surely everyone will concede that, in the infinite multitude of legal states of fact, the more points that have been clarified by final and authoritative decision from the court of last resort in a jurisdiction, the more certain is the law of that jurisdiction. In any event, it must be apparent that the key to the objectionable mass of case law is a perfect digest system rather than less case law.

Merely to condemn the memorandum opinion in a general way is not enough. I want to point out its two chiefest faults.

One fault—and it is one upon which I need not dilate, because it is not essentially a fault, but rather is simply an abuse—is that it affords opportunity to the appellate court to evade its duty. Under cover of the memorandum decision, a Supreme Court may reverse itself back and forth, it may avoid troublesome questions, it may leave, unsolved, matters of substantive doctrine and adjective practice very vitally useful to the bar of the State. This is a danger which only the conscience of the court can regulate. We shall leave it without more than this advertence thereto.

The other fault is that it creates unpublished law. A case goes up from a particular circuit or district. The lawyers in the case, and often several others, and the judge know what the record is and what is the principal point involved. The lower court is affirmed by memorandum decision. That memorandum decision makes law for that circuit or district. The judge knows that he has been upheld in his ruling by the appellate court. He regards the case as a precedent. But not all or many of his own bar know the significance of the case. When they advise clients they do so at their peril. The reports show nothing decided—yet something has been decided. *Stare decisis* intervenes. To expatiate upon the embarrassment of such a situation to a lawyer from another circuit or from the same circuit or district unfamiliar with the facts and points in this case is needless.

A *nisi prius* judge will often readily reverse himself, with reference to rulings on similar points in other cases, where his ac-

tion has not been passed upon by the appellate court. If he is shown by argument to be wrong, he is not so lost in pride of opinion that he will not frankly change his views. Not so, however, when he has the approval of the Supreme Court behind him by memorandum decision. He would not then dare, for he would thus invite reversal.

Worse still, the decision has become law for the whole state. The point has been presented, argued, decided upon—but the law has not been declared. If there is any virtue in the doctrine of precedents, the case is, so long as the memory of it abides with the particular bench, as definitely part of the tissue of the law of that State as if it had been handed down by formal opinion Pity the unfortunate wight of a lawyer, the hapless judge of a court of first instance, who go merrily on their unwitting way, ignorant of the law they help to administer. It reminds one of that Roman ruler who wrote his laws small and posted them high, that they might not be read, in order to enjoy chastising offenders thereof. Yet we are supposed to do reverence to the maxim "Ignorance of the law is no excuse."

We consequently have litigation that would never have arisen, and judgments that no preparation could anticipate, all as the product of the memorandum decision. Each circuit or district has its memorandum decision law. Hundreds of points have become fixed by an unpublished and unwritten process. In order to have less case law, we encourage more cases.

No case that goes to an appellate court is so unworthy as not to warrant a short statement of facts, a short point, and a citation of authority. If the appellate courts do not wish to consider cases, they can adopt a few salutory rules about printing the record and the briefs, or the like, and close their doors to supplicants. Far better this than that they admit the appeal by the front portal and let it escape by a rear exit.

GEORGE PALMER GARRETT.

Kissimmee, Fla.

BILLS AND NOTES—STATUTE OF LIMITATIONS.

HOLLAND v. TJOSEVIG.

Supreme Court of Washington. Dec. 18, 1919.

186 Pac. 317.

Where one signed a note as a joint maker, is an accommodation to another maker, and subsequently paid the note, his cause of action against his comaker to recover the amount paid did not accrue until the note was paid, and limitations then began to run.

MAIN, J. The purpose of this action was to recover money which the plaintiff had paid on a promissory note he claiming that it was the primary obligation of the defendant. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and a judgment sustainng the plantiff's right to recover. From this judgment the defendant appeals.

On April 6, 1908, the appellant and respondent at Valdes, Alaska, signed and delivered a promissory note, payable to A. L. Levy & Co., and due six months after date. The note was a joint and several obligation, upon which both of the parties signing were liable as principals. On September 19, 1913, the respondent paid the note to the holder thereof. In the complaint two Alaska statutes are pleaded, one relative to the interest rate in that district, and the other the statute of limitations. The latter statute, among other things, provides that an action upon a contract, express or implied, shall be barred after the lapse of six years. When the cause was called for trial the defendant asked leave to file an amended answer in which he sought to plead the same statute of limitations as a defense. This request, upon objection by the respondent, was refused by the court. The present action was begun on February 11, 1918, or within six years after the respondent had paid the note.

The first question is whether the evidence sustains the finding of the trial court that the appellant was the sole beneficiary of the consideration for which the note was given. The testimony upon this question took a somewhat wide range. The trial court, as already indicated, found that, as between the parties to this action who were the makers of the note, the respondent signed as an accommodation maker

and in the capacity of a surety, and that the appellant had received the entire consideration for which the note was given. As we view the record, the preponderance of the evidence sustains the findings of the trial court.

The next question is whether oral testimony is admissible to show that, as between the makers of a note, one of the parties was in fact a surety, and that the obligation was primarily that of the other signer where the parties as to the holder were jointly and severally liable. Upon this question the rule is that, as between the makers of a note and the holder, all are alike liable, all are principals, but that between themselves their rights depend upon other questions, and these rights may be determined by oral testimony. Robinson v. Lyle. 10 Barb. (N. Y.) 512; Apgar's Administrative v. Hiler, 24 N. J. Law, 812. In the latter case it was said:

"But it was clearly competent for the plaintiff to show in what relation the several signers of the note stood to each other—as to the payee they were all principals, and all bound jointly and severally to pay the debt. But their relation to each other depended, not upon the form of the note, nor whether their names were signed first or last to the note, but upon the character in which they became parties to the note, and the agreement or contract made among themselves at the time of signing. This was matter in *pais* proper to be proved by parol. And though the memorandum imports *prima facie* that Apgar and Hiler were joint securities, it was compentent for the plaintiff to show whether they were securities for Fisher alone, or for each other also."

As to the statute of limitations, the appellant claims that the statute runs from the due date of the note. The respondent claims that the staute was not set in motion until he paid the note. This is not an action upon the note, but upon an implied obligation which arose when the respondent paid the note upon which he, as related to the appellant, was a surety. The cause of action did not accrue until the note was paid, and the statute of limitations then began to run. Reid v. Flippen, 47 Ga. 273; Shepard v. Ogden, 2 Scam. (Ill.) 257; Wilson v. Crawford, 47 Iowa, 469; Barnsback v. Reiner, 8 Minn. 59 (Gil. 37); Thayer v. Daniels, 110 Mass. 345. In the last case cited it was said:

"There was an implied promise on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run. Of course, the exception that the claim of the plaintiff is barred by that statute cannot be maintained."

In this case the repsondent paid the note on September 19, 1913. The cause of action arose when the note was paid by respondent. The statute of Alaska permits an action to be maintained upon an implied obligation within six years after the cause of action accrued. The present action was instituted on the 11th day of February, 1918, and within the six-year period, and hence was not barred by the statute of limitations.

The appellant cites a line of cases which hold that the acknowledgment by one partner of a partnership debt after the dissolution of the partnership does not deprive the other partner of the benefit of the staute of limitations. This rule, however, has no application to the facts in the present case. The parties here were not partners but the makers of a promissory note, and, as between themselves, one was a principal and the other a surety.

Some complaint is made of the ruling of the trial court in refusing to permit the amended answer to be filed. Upon this question it only need be said that by this ruling the appellant was not prejudiced. He sought to plead as a defense a statute which had been set out in the complaint. Upon the trial he was not denied the right to offer any testimony by reason of the fact that the amended answer was not filed. The statute of limitations, having been pleaded in the complaint could be invoked by the appellant in his behalf, even though not pleaded in the answer.

The judgment will be affirmed.

HOLCOMB, C. J. and MACKINTOSH, MITCHELL, and PARKER, JJ., concur.

NOTE—*Right of Accommodation Indorser to Recover Though Action on Note is Barred.*—Where the law implies a contract of reimbursement, then the party to be reimbursed has a right of action from the time the reimbursee pays. And this principle operates where compulsory payment is made by an administrator at a time when the obligation on which payment is made is barred against an accommodated party. Thus in Blanchard v. Blanchard, 201 N. Y. 134, 94 N. E. 630, a decedent was indorser on a note, which became barred in September, 1906. His administrator was appointed in March, 1906, and the note was paid by the administrator in February, 1907. He brought suit in October, 1907. So far as decedent was concerned the statute of limitations was suspended from March, 1906, for eighteen months. The Court said the payment was not voluntary. It was the right of the indorser to pay the note and he could "bring his action upon the implied promise, inde-

pendent of the promise by the note of the (maker) to reimburse him."

It is said that "In such cases the indorsement is an independent collateral contract entered into by the indorser, that (the maker) may sell the note and no relation of principal and surety exists between him and the maker." Colgrove v. Fallman, 67 N. Y. 95, 23 Am. Rep. 90.

It was ruled in Reynolds v. Doyle, 1 Mann. & G. 753, in 1840, that the time within which an accommodating party pays a note is from the date he pays, and it has nothing to do with the obligation of the principal obligor, so far as the statute of limitations is concerned. That obligation had passed out of existence when the accommodating party paid. He had done what he was obligated to do.

If an indorser pays a note and strikes out all intermediate indorsements, he stands like any purchaser of the note. Pinney v. McGregory, 102 Mass. 186.

Whenever a surety is compelled to pay from that time his right to indemnification accrues and the statute of limitations then begins to run. Thayer v. Daniels, 110 Mass. 345.

As a distinction it is pointed out that if a surety pays a note before maturity his right of action is governed by the statute of limitations applicable to the obligation that has been discharged. Tillotson v. Rose, 11 Metc. (Mass.) 299.

The rule as to accrual of action in favor of an accommodating party applies also to one who pays more than his proportionate share and seeks reimbursement from cosureties. Washington v. Norwood, 128 Ala. 383, 30 So. 405; Pass v. Granada County, 71 Miss. 426, 14 So. 447; Singleton v. Townsend, 45 Mo. 379; McCrady v. Jones, 44 S. C. 406, 411, 22 S. E. 414. When a surety makes partial payments, the statute runs from each payment.

Bushnell v. Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411.

All accommodation parties as signers to negotiable papers stand on the same rule as does any surety. Augrove v. Tippett, 11 L. T. Rep. (N. S.) 708; Godfrey v. Rice, 59 Me. 308; Farmers' Bank v. Gilson, 6 Pa. St. 51; Wilson v. Crawford, 47 Iowa 469, whether the payment be at one time or by partial payments. Darrow v. Summerhill, 24 Tex. Civ. App. 208, 58 S. W. 158; Bullock v. Campbell, 9 Gill (Md.) 182; Frank v. Brewer, 4 Sil v. Sup. (N. Y.) 155, 9 N. Y. Supp. 182.

The principle on which the cases go is referable to negligent performance or neglect of duty imposed by contract. Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Taylor v. Hammell, 201 Pa. St. 546, 51 Atl. 316; O'Connor v. Aetna L. Ins. Co., 67 Neb. 122, 93 N. W. 137.

The Courts view the extension of liability beyond the life of a promissory note to a new circumstance within the contemplation of the parties, and they so rule as to protect fully the accommodating party. Any other rule has within it the possibility of an accommodating party paying at the last moment his liability exists and then, by some unfortunate circumstance, being unable to get reimbursement. C.

CORRESPONDENCE.

IS THE CONSTITUTION EVER UNCONSTITUTIONAL?

To the Editor of the Central Law Journal:

I hold no retainer in any case, civil or criminal, involving the application of a prohibition law, State or Federal, and write in a judicial spirit. The thesis of Mr. Wayne B. Wheeler, in your issue of February 27, 1920, "The Constitutionality of the Constitution is Not a Justiciable Question" sounds strangely in lawyer ears, because his argument in support of it is of itself an appeal to legal judgment, proving that his thesis is a contradiction in terms.

If Mr. Wheeler does not hold a retainer for Prohibitionists, he is one of those extremists who wilfully close their eyes to the fact, that the use of alcohol as an "ingredient of beverage liquor" is the least part of its use.

The principal part of the uses of alcohol is in medicine and in the arts. Alcohol is absolutely indispensable in both of those uses. Nothing can take its place.

Storer's "Dictionary of Solubilities" shows that as far back as in 1864, there were one thousand one hundred seventeen substances, which can be used only in solution, are indispensable in medicine and in the arts, yet can be dissolved only by alcohol and by nothing else. The use of alcohol is, therefore, a blessing, not a curse to humanity. To assert otherwise is to fly in the face of a Divine Providence.

Now, any legislation which would force upon the citizens of a sovereign state of this union, the prohibition of the manufacture of an article absolutely essential to medicine and to the arts, is an invasion of the personal rights of the free citizens of that state, unwarranted by Article V of the Constitution of the United States.

Nothing in that article sanctions amendments whose effects invade the personal rights, which citizens of states had when they formed the union. Those rights are those which they brought with them from England, and are such as Englishmen now possess in England.

A simple test to apply to any proposed amendment of the Constitution of the United States to determine its legality is—would it deprive the people of the objecting states of any personal right enjoyed by a citizen of England today? If it does, it is not such amendment as Article V permits.

The colonial states united to form a *union*, they did not consolidate into an empire. The states remain independent sovereigns and Article V is to be construed with reference to the foregoing fact.

The United States form a corporation.

That the United States are a corporation has been distinctly held by the United States Supreme Court in the case of United States v. Perkins, 163 U. S. 625. In that case the court say:

"The case really presents two questions:

1. Whether it is within the power of the State to tax bequests to the United States. (P. 627.)

2. Whether, under these statutes, the United States are a corporation exempted by law from taxation."

Further on, the court say:

"What the corporations are to which the exemption was intended to apply are indicated by the tax laws of New York, and are confined to those of a religious, educational, charitable or reformatory purpose. We think it was not intended to apply it to a purely political or governmental *corporation like the United States.*" (P. 631.)

It is elementary law that a corporation cannot make by-laws inconsistent with its fundamental charter. It is as ridiculous to assert that the *legislatures* of three fourths of the states can say to the people of the other one-fourth of the states "You shall not make and use alcohol in medicine and the arts" as for three-fourths of the stockholders of a business corporation to make a by-law forbidding the other one-fourth stockholders of the bank to make and use alcohol in their homes.

"Non in haec foedera venimus" is the proper answer to the defenders of the Federal prohibition amendment.

FREDERICK G. BROMBERG.

Mobile, Alabama, March 1, 1920.

There is much that is interesting in the argument of our correspondent who seeks to establish the proposition that no amendment can be made to the constitution which would destroy "any personal right enjoyed by a citizen of England today." What the writer means is probably rights existing at the time of the settlement of the English Colonies in America. Any new rights created or recognized since then could be no criterion for any purpose. The thought occurred to us, however, that the southern states made that argument in order to retain slaves, which was undoubtedly a right of a citizen of England at the time of the revolution. The point is interesting, however, and may be pressed with some force.

ED.

HUMOR OF THE LAW.

At a banquet at Delmonico's Mr. Choate, looking up at the balconies, which were filled with women, said:

"I understand now why it is said that man is a creature a little below the angels."

"Keeping quiet," was the reply of a reporter to the question: "What is the noblest quality in a good woman?"

"At last, after much faltering, I found courage to pop the question. The date was July 4, 1861. It was on Independence Day that I sacrificed my independence," he said in a speech to his neighbors on the celebration of his golden wedding.

"My learned friend and I," said Mr. Bangs, a distinguished lawyer opposing Mr Choate in the famous Cesnola case, "tried a case before Judge Wheeler some time ago. He is now using whatever knowledge of law he happened to glean from me then before this court. I submit it is hardly fair." Instantly Choate replied: "Why, I had forgotten that you ever said anything regarding the law."

"If your proposition is good law, Mr. Choate," said one of the Tweed judges in an argument, "I will go home and burn my law books." "Better read them, Your Honor," was the reply, given with Mr. Choate's blandest smile.

On Abraham Lincoln:

"In the zenith of his fame he was the wise, patient, courageous, successful ruler of men, exercising more power than any monarch of his time, not for himself, but for the good of the people who had placed it in his hands; commander-in-chief of a vast military power which waged with ultimate success the greatest war of the century. The triumphant champion of popular government, the deliverer of 4,000,000 of his fellow men from bondage; honored by mankind as statesman, President and liberator."—*Address before the Edinborough Philosophic Institute, Nov. 13, 1900.*

On Judges:

"Jerrold's counsel to the young author might be taken to heart by every candidate for admission to the bar: 'Don't take down the shutters until you have something to show in the window; above all, never try to fool a jury; they are likely to end by fooling you.'"—*Address to graduating class of Columbia Law School.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Appearance**—Voluntary.—A voluntary appearance in an action to foreclose a mechanic's lien is the equivalent of service of summons upon the person so appearing.—Carr-Cullen Co. v. Cooper, Minn., 175 N. W. 696.

2. **Banks and Banking**—Insolvency.—A bank director could not be convicted, under Code 1906, § 1169, for receiving a deposit, "having good reason to believe that the bank was then and there insolvent," upon evidence only showing him to be grossly negligent in the discharge of his duty as a director of the bank.—Buckley v. State, Miss., 83 So. 403.

3.——Collection.—A bank's neglect to demand payment of notes given to it for collection and bind the indorsers by protest and notice does not make it liable for the notes as if it were surety, guarantor, maker, or indorser, but only for resulting damages to holder.—Farmers' & Merchants' Bank of Reedsville v. Kingwood Nat. Bank, W. Va., 101 S. E. 734.

4. **Bills and Notes**—Delivery.—Where a note is procured by fraud and misrepresentation, there is no legal execution nor delivery of it, and it is of no legal force nor effect.—Stevens v. Barnes, N. D., 175 N. W. 709.

5.——Parties Inter Sese.—As between the makers of a note and the holder all are alike liable, all are principals, but between themselves their rights depend on other questions.—Holland v. Tjosevig, Wash., 186 Pac. 317.

6.——Repurchase of Note.—Where a bank was not originally a holder of note in due course, it could not repurchase the note from such a holder and acquire his immunities.—Peltier v. McFerson, Colo., 186 Pac. 524.

7. **Burglary** — Property Stolen. — One who broke into a storehouse and carried away articles therefrom committed no offense, under Ky. St. § 1164, unless the articles taken were "goods, wares, or merchandise" of value.—Ellis v. Commonwealth, Ky., 217 S. W. 368.

8. **Carriers of Passengers** — Passenger. — Where one boards a street car, intending to become a passenger, the conductor making no objection, and thus impliedly accepting him as a passenger, it is immaterial that he has not paid his fare.—Chapman v. Kansas City Rys. Co., Mo., 217 S. W. 290.

9. **Charities**—Hospital.—A hospital of the class commonly known as charitable corporations, which was founded and its buildings erected partly by money donated and partly by money borrowed, and which was not maintained for profit, but in which most of the patients were pay patients so that receipts largely exceeded cost of maintenance, was liable in damages for the negligent death of a patient.—Mulliner v. Evangelischer Diakonniessenverein of Minnesota Dist. of German Evangelical Synod of North America, Minn., 175 N. W. 699.

10. **Chattel Mortgages**—Assignment of Note.—A mortgage of real or personal property being but an incident or accessory of the debt secured, an assignment of the note evidencing the debt carries the mortgage with it.—Waterbury Co. v. Weisman, Conn., 108 Atl. 550.

11. **Compromise and Settlement** — Disputed Claim.—Where plaintiff physician, after some discussion with defendant client regarding a disputed bill, received and cashed defendant's check, stating that it was in full payment of the account to date, held, such action precluded plaintiff from recovering the balance of the bill from defendant.—Booth v. Dougan, Mo., 217 S. W. 326.

12. **Conspiracy**—Damages.—In an action for damages for conspiracy an express agreement between the defendants to defraud plaintiffs is not necessary; such a tacit understanding being sufficient.—Lange v. Heckel, Wis., 175 N. W. 788.

13. **Contracts** — Law of Domicile.—Parties may contract with reference to the laws of another state or country, although they may not be domiciled there at the time of making the contract, and such contracts will be enforced and recognized in other forms where contrary rules of law may prevail.—Fidelity Loan Securities Co. v. Moore, Mo., 217 S. W. 286.

14.——Option.—Option given to buyer by fig crop sale contract to accept or reject defective figs was not void for lack of mutuality, being part of the entire contract, which was supported by mutual promises and a money consideration.—Rosenberg v. Rogers, Cal., 186 Pac. 366.

15.——Oral Waiver.—The conditions of a written contract may be orally waived.—Walker v. Harbor Business Blocks Co., Cal., 186 Pac. 356.

16.——Rescission.—A party cannot rescind a contract without offering to put the other party

in statu quo.—Normile v. Denison, Wash., 186 Pac. 305.

17.——Restraint of Trade.—Contractive stipulations in restraint of trade in agreements between employer and employe are not viewed with the same indulgence as are such stipulations between seller and buyer of a business and its good will.—Samuel Stores, Inc., v. Abrams, Conn., 108 Atl. 541.

18.——Validity.—The validity of a contract is to be determined as of the date of its execution, and a contract, valid when made, cannot be rendered invalid even by legislative action. —Sheffield-King Milling Co. v. Jacobs, Wis., 175 N. W. 796.

19. **Corporations** — Assignment of Stock.—Bank, which took assignment of stock as security for loan, was not charged with limitation placed on it by borrower's assignor, or of any secret agreement made between borrower and assignor as to use which might be made of assignment.—Spellacy v. Young, Cal., 186 Pac. 368.

20.——Delivery of Certificate.—In view of St. 1903, c. 423, § 1, where a stockholder signed transfer in blank on the back of his certificate, stating the shares were sold, assigned, and transferred "as collateral," with a blank power of attorney embodying right of substitution to transfer the shares on the books of the company, had the words "as collateral" been omitted, the certificates indorsed in blank would have been sufficient delivery to transfer title as against all persons.—Crosby v. Simpson, Mass., 125 N. E. 616.

21.——Foreign Corporation.—Though a foreign corporation has engaged in business in New York, and as a condition of doing so has under the laws of that state designated an individual on whom process against it may be served in the state, a Court in that state does not, in an action on a cause arising out of the state, obtain jurisdiction of its person by service of summons on such individual, after it has removed from the state; his unrevoked designation not giving it constructive presence in the state.—Chipman, Limited, v. Thomas B. Jeffrey Co., U. S. S. C., 40 Sup. Ct. 172.

22.——Payment with Notice. — Corporate checks drawn by an officer in payment of his private obligations carry upon their face notice of their irregular and illegal character as to a payee who admitted receiving the checks for the officer's personal indebtedness.—Napoleon Hill Cotton Co. v. Stix, Baer & Fuller Dry Goods Co., Mo., 217 S. W. 323.

23. **Criminal Law**—Accessory After the Fact. —One connected with the crime as an accessory after the fact is not an accomplice.—State v. Lyons, Minn., 175 N. W. 689.

24——Admissions.—An admission is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending to prove his guilt, but of itself insufficient to authorize a conviction.—State v. Guie, Mont., 186 Pac. 329.

25.——Aiding and Abetting.—All persons who assist or abet another in the commission of a misdemeanor are equally guilty as principals.— Edwards v. State, Ga., 101 S. E. 766.

26.——Good Reputation.—Evidence of good reputation may of itself work an acquittal, by creating a reasonable doubt of guilt, where in the absence of such evidence there would be no such reasonable doubt, and such good reputation is substantive evidence in favor of innocence, to be considered by a jury in connection with the other evidence, and when so considered, if there is a reasonable doubt of guilt, there must be an acquittal, but if, when so considered, jury is satisfied of guilt beyond a reasonable doubt, they should convict.—Commonwealth v. Tenbroeck, Pa., 108 Atl. 635.

27.——Intent.—In a prosecution for obtaining property by false pretenses, testimony to show intent that accused had made representations to other parties similar to those alleged should not have been admitted.—State v. Bratton, Mont., 186 Pac. 327.

28.——Statements by Counsel.—Where defendant's counsel on cross-examination made an emphatic statement as to his belief concerning a matter which was the subject of inquiry, it was not inappropriate for the court to remind him that he had better be sworn before testifying.—State v. Herwitz, Wash., 186 Pac. 290.

29.——Withdrawal of Plea.—An applicant, seeking to withdraw a plea of guilty, should state the substance of his defense, so that the Court may judge of its merits.—Turner v. State, Miss., 83 So. 404.

30. **Damages**—Special.—Special damages, that is damages which do not necessarily result from the injury complained of, must be especially pleaded, except where they are conclusively presumed from the facts stated.—Kennedy v. Van Horn, Okla., 186 Pac. 483.

31. **Death** — Rebuttable Presumption. — The presumption of death based on seven years' absence is controvertible, and may be rebutted by proof of facts and circumstances sufficient to overcome it.—Kaufmann v. New York Life Ins. Co., Cal., 186 Pac. 360.

32. **Disorderly House**—Offense of.—To constitute the offense of keeping a disorderly house, it must appear that disorderly acts are habitually permitted on the premises, or that the house is kept as a place to which people may and do resort to indulge in immoral or unlawful practices.—State v. Namick, Minn., 155 N. W. 693.

33. **Divorce**—Cruelty.—Where the differences between a husband and wife show human infirmities that do not become so serious as to bring them within the rules laid down by the Supreme Court as to what constitutes extreme cruelty and violent and ungovernable temper towards defendant, a divorce will not be granted.—Croghan v. Croghan, Fla., 83 So. 460.

34.——Custody of Child.—Where, after divorce decree was entered awarding custody of child to the mother, the mother and child became domiciled in another state with the knowledge and consent of the father, a modification of the original decree ex parte giving the father the custody of the child should not be binding upon the Court of the state where the child was domiciled at the time the modification was made.— Groves v. Berto, Wash., 186 Pac. 300.

35. **Easements**—Way of Necessity.—Where defendant had a right of way by necessity, evidence as to continued and uninterrupted user thereof would be relevant to show what was the way set out and defined by his grantor over grantor's land.—Chenevert v. Larame, R. I., 108 Atl. 589.

36. **Equity**—Final Decree.—A Court of equity ought not to and will not render a final decree, which cannot be made without seriously affecting the interest of one who is not a party to the suit, or without leaving the controversy pleaded in such condition that its final determination might be inconsistent with equity and good conscience.—Fryer v. Weakley, U. S. C. C. A., 261 Fed. 509.

37. —— Multifariousness. — In determining whether a bill is multifarious, Courts are governed principally by the rule of convenience as applied to each particular case, and there is apparently no well-defined rule of equity practice which can properly be applied to every case to determine multifariousness.—Lockhart v. Hoke, W. Va., 101 S. E. 730.

38. **Executors and Administrators**—Tax Certificate.—A tax certificate, being real property, is not assets in hands of executor, but passes to heirs, and hence assignment by executor passes no title.—Madler v. Kersten, Wis., 175 N. W. 779.

39. **Forgery**—Loss to Prosecutor.—That forgery or unlawful use of forged instrument has not resulted in loss to persons who might have been injured thereby does not render the wrongdoer any less guilty in the eyes of the law.—People v. Webber, Cal., 186 Pac. 406.

40. **Fraudulent Conveyances**—Recovery by Grantor.—Where plaintiff son transferred corporate stock to his mother, either to put it out of his hands, so as to avoid any judgment against him by third parties, or transferred it for some consideration, he cannot recover the stock on the theory that the mother holds it in trust for him.—Sewell v. Sewell, Wash., 186 Pac. 289.

41. **Gifts.**—Delivery of Note.—A note not delivered to the payee in the lifetime of the maker was not effective as a gift.—Isett v. Maclay, Pa., 108 Atl. 610.

42. **Good Will**—Injunction.—Plaintiff, who purchased through an intermediary defendant's clothing business previously conducted under the names "Phil, the Outfitter," and "Phil & Eddie," including the good will, can enjoin defendant from operating a store directly across the street, claiming to be the only genuine "Phil & Eddie" store in the vicinity, pursuant to the open intention of running plaintiff out of business.—Rosenberg v. Adelson, Mass., 125 N. E. 632.

43. **Husband and Wife**—Alienation of Affections.—If a feeling of indifference or repugnance on the part of plaintiff's wife toward him preceded and accompanied defendant's alienating relations with such wife, plaintiff can recover little or nothing for simple alienation of affections; and, even where criminal conversation is also charged by plaintiff, the real attitude of the mind of his wife toward him is important in its bearing on damages.—Cutter v. Cooper, Mass., 125 N. E. 634.

44.——Community Property.—Since the law intrusts community property to the husband's sole control and management, it is his duty to render a true, open, and fair account when the community is to be dissolved.—Normiler v. Dennison, Wash., 186 Pac. 305.

45. **Inspection**—Police Power.—To detect and prevent stealing of live stock the legislature may enact a law for the inspection of hides as a condition of their shipment within or without the state by a common carrier.—State v. Hines, Ore., 186 Pac. 420.

46. **Insurance**—Death from Accident.—The burden is on the plaintiff to show that insured's death was accidental.—Dodder v. Aetna Life Ins. Co. of Hartford, Conn., Neb., 175 N. W. 651.

47.——Discrimination.—A mutual company could not legally discriminate in favor of one or some of the policy holders to the prejudice of the others.—Rougon v. Equitable Life Assur. Soc. of U. S., La., 83 So. 434.

48.——Insurable Interest.—The right to redeem is an insurable interest, especially where by understanding of all parties the debt of the mortgagor continued to exist, and the holder of the sale certificate held it as security, and this, though mortgagor's right of redemption be not subject to execution.—Twin City Fire Ins. Co. v. Stockmen's Nat. Bank of Ft. Benton, Mont., U. S. C. C. A., 261 Fed. 471.

49.——Suicide.—Death self-inflicted with suicidal intent while same is not "accident" insured against by an accident policy.—Bayha v. Fidelity & Casualty Co. of New York, Mo., 217 S. W. 269.

50.——Waiver.—Insurer, by electing to act on verbal notice of hail loss given to local agent by sending its inspectors and adjusters to ascertain the loss and offering to settle for an amount which insured refused to accept, waived right to written notice, and ratified local agent's unauthorized acceptance of notice.—Cahill v. Royal Ins. Co., Conn., 108 Atl. 544.

51. **Interest**—Computation.—Generally where amount of recovery, if recovery be had, is definitely fixed by agreement of the parties or capable of ascertainment by mere computation, interest should be computed from the time the debt became due.—U. S. Fidelity & Guaranty Co. v. California-Arizona Const. Co., Ariz., 186 Pac. 502.

52. **Judgment**—Collateral Attack.—A judgment of a Court that had jurisdiction of the subject-matter and the parties is impervious to collateral attack in other Courts, or in the same Court, though erroneous in law, but not to direct attack.—Grahl v. U. S., U. S. C. C. A., 261 Fed. 487.

53.——Res Adjudicata.—To make a matter res adjudicata there must be a concurrence of the four conditions following, namely: (1) Identity in the thing sued for (or subject-matter of the suit); (2) identity of the cause of action; (3) identity of persons or parties to the action; (4) identity of the quality in the persons for or against whom the claim is made.—Etenburn v. Neary, Okla., 186 Pac. 457.

54. **Landlord and Tenant**—Exclusive Control.—Where the stairs on which a tenant's wife fell were let as part of the tenement, the landlord retaining and exercising no control over them, there can be no recovery for injuries to the wife or the tenant himself, unless at the time of letting the landlord specially undertook to repair, either with or without notice.—Palmigiani v. D'Argenio, Mass., 125 N. E. 592.

55.——Quiet Enjoyment.—A landlord's covenant of quiet enjoyment and possession, when not expressly set forth, will be implied from the usual formal terms of the lease, "lease and let," or "demise and let."—Minnich v. Kauffman, Pa., 108 Atl. 597.

56. **Limitation of Actions**—Estoppel.—A debtor is not estopped asserting the defense of limitations by his admission of indebtedness.—Carter v. Canty, Cal., 186 Pac. 346.

57. **Livery Stable and Garage Keepers**—Burden on Bailee.—Where an automobile is stolen from a public garage in which it had been stored for pay, the burden is on the garage keeper to show that he was free from negligence.—Steenson v. Flour City Fuel & Transfer Co., Minn., 175 N. W. 681.

58. **Partnership**—Requisite of.—One essential requisite of a partnership is an agreement to share losses as well as profits.—McCarney v. Lightner, Iowa, 175 N. W. 751.

59. **Principal and Agent**—Fidelity to Principal.—Generally an agent who is guilty of fraud upon his principal, or who betrays his trust by acting adversely to the interest of his principal, or is guilty of unfaithfulness, dishonesty, gross misconduct, gross mismanagement, or unskillfulness, or who fails to follow the express instructions, forfeits his right to compensation.—Arthur Koenig Co. v. Graham Glass Co., Wis., 175 N. W. 814.

60. **Malicious Prosecution**—Advice of Counsel.—A person making complaint on advice of reputable attorney, after a full, fair, and honest statement to attorney of all facts and information within his knowledge, honestly believing the person charged to be guilty, has probable cause, as a matter of law, for his action.—Smith v. Federal Rubber Co., Wis., 175 N. W. 808.

61. **Master and Servant**—Assumption of Risk.—Whether injured switchman knew of danger, and so assumed the risk of being injured while upon the side of a box car passing a mill shed post near the track, held a question for the jury.—Ford v. Dickinson, Mo., 217 S. W. 294.

62.——Assumption of Risk.—A servant who gives notice of dangers which the master agrees to remedy does not assume the risk of injury by remaining at work for a reasonable time.—Kokomo Steel & Wire Co. v. Ramseyer, Ind., 125 N. E. 580.

63.——Assumption of Risk.—Ordinarily a servant assumes the risks incident to the negligent acts of the officers, agents, and fellow employes of the master, but not the risks of unusual and extraordinary acts of negligence.—Dutrey v. Philadelphia & R. Ry. Co., Pa., 108 Atl. 620.

64.——Independent Contractor.—One is an "employe" of another when he renders service for him, and what he agrees to do or is directed to do is subject to the will of the other, in the mode and manner in which the service is to be done, and in the means to be employed in its accomplishment, as well as in the result to be attained, but is an" independent contractor" if in carrying on work for another he is indepen-

dent of the other's control in the mode, manner, and means of doing the work.—Kinsman v. Hartford Courant Co., Conn., 108 Atl. 562.

65.——Respondeat Superior.—A solicitor and collector for a life insurance company, fatally injured by a street car when running across the street to take a car, was injured in the course of his employment, within the Workmen's Compensation Act; his necessary use of street cars in his employment exposing him to dangers not too remote in their causative relation to the employment.—Moran's Case, Mass., 125 N. E. 591.

66.——Volunteer.—A person, by merely volunteering his services to another, or by assisting the servants of another without authority to employ such assistance, cannot establish the relation of master and servant, and so establish liability for injuries under the principles of law governing master and servant.—Houston, E. & W. T. Ry. Co. v. Jackman, Texas, 217 S. W. 410.

67.——Workmen's Compensation Law.—An employe injured by negligent act of a third party employer within Workmen's Compensation Act (Gen. St. 1913, § 829) may maintain an action against such employer notwithstanding a settlement had with his own employer and the payment of the amount agreed upon. —Podgorski v. Kerwin, Minn., 175 N. W. 694.

68. **Mechanic's Lien**—Ejusdem Generis.—By the rule of ejesdem generis, where, in oil and gas lease, general words follow the enumeration of particular classes of minerals, the general words will be construed as applicable only to the same general character or class as those enumerated.—Wolf v. Blackwell Oil & Gas Co., Okla., 186 Pac. 484.

69.——Test of.—The test of whether lien claimant was a contractor or materialman is the relative value of the material and the labor supplied; the claimant being a materialman if the value of the labor is small in comparison with that of the material.—Ferger v. Gearhart, Cal., 186 Pac. 376.

70. **Mortgages**—Lien.—The lien of a judgment recovered against the mortgagor takes priority over a mortgage which was not executed as to be entitled to be recorded.—First Nat'l Bank v. Casselton Realty & Investment Co., N. D., 175 N. W. 720.

71. **Negligence**—Injury by Third Person.—The act of a third person intervening and contributing a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer, if such act ought to have been foreseen.—Marton v. Jones, Cal., 186 Pac. 410.

72.——Last Clear Chance.—The essentials of last clear chance doctrine are that the injured party has come into a position of peril; that injuring party then or thereafter became, or by exercise of ordinary prudence ought to have become, aware, not only of that fact, but also that the party in peril either reasonably cannot escape from it, or aparently will not avail himself of opportunities for escape; that the injuring party subsequently has opportunity, by exercise of reasonable care, to avoid the injury, and fails to exercise such care.—Tullock v. Connecticut Co., Conn., 107 Atl. 556.

73. **Railroads** — Imputable Negligence. — Though a passenger in an automobile approaching a railroad is not chargeable with the driver's negligence, he is responsible for his own lack of reasonable care.—Martin v. Pennsylvania R. Co., Pa., 108 Atl. 631.

74. **Reformation of Instruments**—Equity.—Equity has jurisdiction to reform written instruments in cases of "mutual mistake"; that is, a mistake reciprocal and common to all the parties to the transaction, as where there has been a meeting of the minds, an agreement actually entered into, but where the instrument in its written form does not express the real intention of the parties.—Literal v. Bevins, Ky., 217 S. W. 369.

75.——Mutual Mistake.—Where parties had fully agreed on provisions of a lease contract and lessee had entered into possession, and by mutual mistake of parties or the mistake of one and the fraud or inequitable conduct of the other the written lease thereafter prepared and presented by lessor did not embody all of his covenants, equity has jurisdiction to reform lease to make it cover the contract actually agreed upon.—White v. Kelly, W. Va., 101 S. E. 724.

76. **Robbery**—Putting in Fear.—Robbery is accomplished if the owner is deprived of his property either by force or by putting in fear. —Graves v. Commonwealth, Ky., 217 S. W. 356.

77. **Sales** — Inspection. — Ordinarily a buyer has a reasonable opportunity to inspect goods before payment, but such rule does not apply where the contract provides otherwise.—Ten Broeck Tyre Co. v. Rubber Trading Co., Ky., 217 S. W. 345.

78. **Street Railroads**—Last Clear Chance.—Where the evidence showed nothing to reasonably indicate to a motorman any purpose or lack of ability on the part of an automobile driver inconsistent with the duty or intention of managing a light automobile in an ordinary careful manner until it was too late to avoid the collision, the doctrine of the last clear chance was not applicable.—Heath v. Wylie, Wash., 186 Pac. 313.

79.——Pedestrian.—A pedestrian was entitled to use the public ways for free and unobstructed passage, a use not restricted to crosswalks or sidewalks, or to the part not used by a street railway in a street where cars were operated.—Crowell v. Boston Elevated Ry. Co., Mass., 125 N. E. 607.

80. **Sunday**—Killing by Mistake.—Since hunting game on Sunday is expressly prohibited by P. S. 5957, shooting of man on Sunday by mistake for game was unlawful act voluntarily done, for which defendant was liable, whether it resulted from carelessness or accident.—White v. Levarn, Vt., 108 Atl. 564.

81.——Police Power.—Under the police power the legislature may impose such reasonable penalty for violation of the Sunday Law as it may deem necessary to make the law effective.—State v. Murray, Neb., 175 N. W. 666.

82. **Trusts** — Restraint on Alienation.—Restraints on alienation of property by way of spendthrift trusts are void as limitations attached to legal interests, and valid as respects equitable fees in real estate and interests in personal property.—Haskell v. Haskell, Mass., 125 N. E. 601.

83.——Substituted Trustee.—Appointment of a substitute trustee, appointed under Rev. Laws, c. 147, § 5, cannot be attacked collaterally.—Hanscom v. Malden & Melrose Gaslight Co., Mass., 125 N. E. 626.

84. **Vendor and Purchaser**—Revocation of Option.—To effect revocation of a revocable option to purchase or sell land, it was only necessary that the optioner bring her withdrawal to the notice of the optionee.—Jester v. Gray, Iowa, 175 N. W. 758.

85. **Waters and Water Courses**—Accretion.—If lands become riparian by the washing away of adjoining lands, the owner is entitled to the right of a riparian owner to accretions, even though they extend beyond the original boundary line of his land.—Yearsley v. Gipple, Neb., 175 N. W. 641.

86. **Wills**—Accelerating Remainder.—The doctrine of acceleration of remainders is not applicable, where its application would go counter to the testator's intention.—Swann v. Austell, U. S. C. C. A., 261 Fed. 465.

87.——Election Under.—Where widow takes under the will the same estate she would have taken had her husband died intestate, she cannot contest will.—Egbert v. Egbert, Ky., 217 S. W. 365.

88.——Insane Delusion. — Insane delusions which do not affect the making of the will are not alone evidence sufficient to establish testamentary incapacity.—Kerkhoff v. Monkemeier, Iowa, 175 N. W. 762.

89.——Specific Legacy.—Legacy of specifically described mortgages is specific, and not general. —In re Jepson's Estate, Cal., 186 Pac. 352.

90.——Testamentary Capacity.—The fact that a testator discriminated between his children may be considered with other circumstances in ascertaining his mental condition when he made the will, but the mere fact of inequality or injustice is not alone sufficient ground for finding him to have been mentally incompetent.—In re Linstrom's Will, Iowa, 175 N. W. 741.